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Franklin Covey Client Sales, Inc. v. David Melvin : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FRANKLIN COVEY CLIENT SALES, INC.,	)	
Plaintiff/Appellee,	)	Case No. 981850-CA
v.	)	Priority No. 15
DAVID MELVIN,	)	
Defendant/Appellant.	)	

BRIEF OF APPELLEE FRANKLIN COVEY CLIENT SALES, INC.

On appeal from the November 10, 1998 final Memorandum Decision of the Third Judicial District Court for Salt Lake County, Honorable David S. Young, District Judge

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STATEMENT OF JURISDICTION

David Melvin ("Melvin") appeals from a November 10, 1998 Memorandum Decision by the Third Judicial District Court, Judge David S. Young, denying Motions for Relief From Judgment under Utah Rule of Civil Procedure 60(b)(1), (2) and (3).[1] On December 8, 1998, Melvin filed his Notice of Appeal with the Utah Supreme Court.[2] Pursuant to Utah Code Ann. § 78-2-2(4) (1996), the Utah Supreme Court transferred this case to the Utah Court of Appeals. Jurisdiction lies in this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES

Issue No. 1: Did the trial court abuse its discretion in denying Melvin's Motions for Relief From Judgment under Rule 60(b)(1) (mistake), (2) (newly discovered evidence) and (3) (fraud), thus letting stand its earlier Order granting Franklin Covey Client Sales, Inc.'s Motion for Summary Judgment and denying Melvin's Motion to Dismiss for Lack of Personal Jurisdiction?

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[1]Melvin raised the following five post-judgment motions in the trial court below: Motion for Relief From Judgment (Rule 60(b)(1)), Motion for Relief From Judgment (Rule 60(b)(2), (3)), Motion for Sanctions, Motion to Stay and Motion for Extension of Time to File Appeal. In this appeal, Melvin raises only those issues that were contained in his Motions for Relief From Judgment under Utah Rules of Civil Procedure 60(b)(1), (2) and (3).

[2]This case involves Melvin's "Second Notice of Appeal." Melvin previously filed a Notice of Appeal ("First Notice of Appeal") in an attempt to appeal the trial court's July 27, 1998 Declaratory Judgment. However, Melvin's First Notice of Appeal was filed **46 days** after the trial court entered its Declaratory Judgment. (First Notice of Appeal, R. 424). Consequently, on December 9, 1998, the Utah Supreme Court dismissed Melvin's first appeal (Case No. 981578) as untimely. (Supreme Court's Dec. 9, 1998 Order, R. 681). This case is before this Court based upon Melvin's Second Notice of Appeal and relates only to Melvin's post-judgment Rule 60(b) motions.

Standard of Review: The trial court has discretion in determining whether to grant or deny a movant's Rule 60(b) motion and the trial court's ruling will be reversed only when there has been an **abuse of discretion**. *Ostler v. Buhler,* 957 P.2d 205, 206 (Utah 1998); *Udy v. Udy,* 893 P.2d 1097, 1099 (Utah Ct. App. 1995); *Birch v. Birch,* 771 P.2d 1114, 1117 (Utah Ct. App. 1989).

Issue No. 2: Did the trial court correctly determine that it could exercise specific personal jurisdiction over Melvin?

Standard of Review: When reviewing a claim for lack of personal jurisdiction, the standard of review is a correction-of-error standard, even though the movant's claim was made under Rule 60(b) of the Utah Rules of Civil Procedure. *State Dep't of Social Servs. v. Vijil,* 784 P.2d 1130, 1132 (Utah 1989).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Rule 17(a) of the Utah Rules of Civil Procedure *Real party in interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B. Rule 60(b) of the Utah Rules of Civil Procedure *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgement is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. Nature of the Case

Melvin was employed by Franklin Covey Client Sales, Inc. ("Franklin Covey") as an account executive from November 1, 1995 until September 12, 1997. (Memorandum in Support of Motion for Summary Judgment, R. 100). Prior to the spring of 1997, Melvin was paid a base salary plus commission. *(Id.* at R. 99). In April 1997, Melvin was informed that his employment would be terminated for inadequate sales. (*Id.*). Melvin requested to keep his job and offered to work on a straight commission basis. (*Id.*). Franklin Covey agreed and the parties executed an express agreement (the "Compensation Agreement"). (*Id.* at 100). The Compensation Agreement provided that Melvin would be paid on a straight commission

basis and that commissions would be paid "**only for those services delivered while you are employed by Franklin**." (Exhibit B to Memorandum in Support of Motion for Summary Judgment, R. 114) (emphasis added).

On September 12, 1997, Franklin Covey terminated Melvin's employment. Franklin Covey paid Melvin his commissions for all sales of services and products that were delivered before his termination date. Melvin signed a **release** acknowledging receipt of payment (the "Release"). (Exhibit C to Memorandum in Support of Motion for Summary Judgment, R. 116). A few months later, Melvin's attorney sent Franklin Covey a draft Complaint to be filed in the United States District Court for the District of Maryland and a letter demanding payment for $600,000.00 in commissions on a theory of *quantum meruit* for any sales or services which could conceivably be delivered **after** Melvin's termination. (Exhibit B to Franklin Covey's Complaint, R. 7-13). In response, Franklin Covey filed a declaratory judgment action in the Third Judicial District Court for Salt Lake County, requesting a declaration of rights and obligations of the parties based upon the parties' Compensation Agreement and Melvin's Release. (Franklin Covey's Complaint, R. 1-13).

B. Course of Proceedings Below

After Franklin Covey filed its declaratory judgment action, Melvin removed this case to the United States District Court for the District of Utah.[3] (Melvin's Removal, R.16-17).

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[3]After Franklin Covey filed its Declaratory Judgment Action in the Third Judicial District Court in Salt Lake County, Melvin inundated the trial court and Franklin Covey with a constant (continued...)

Thereafter, Franklin Covey filed a Motion to Remand and a Motion for Summary Judgment. (Franklin Covey's Motion to Remand, R. 33-42; Franklin Covey's Motion for Summary Judgment, R. 93-95). Melvin opposed Franklin's Motion to Remand and filed a Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Change Venue. (Melvin's First Motion to Dismiss, R. 48-49). On May 11, 1998, the U.S. District Court remanded this case to state court. (Order, R. 203-205).

In state court, Melvin filed a second Motion to Dismiss for Lack of Personal Jurisdiction, which was virtually identical to his first Motion to Dismiss filed in federal court. (Melvin's Second Motion to Dismiss, R. 248). Thereafter, Franklin Covey submitted its Motion for Summary Judgment and both of Melvin's Motions to Dismiss for decision. (Notices to Submit, R. 217-18; 357-59). On June 26, 1998, the trial court held a hearing on Melvin's Motions to Dismiss and Franklin Covey's Motion for Summary Judgment. (Hearing Transcript, R. 686). On July 14, 1998, Judge Young entered an Order denying Melvin's Motions to Dismiss. (Judge Young's Order, R. 393-94). In the same Order, Judge Young granted Franklin Covey's Motion for Summary Judgment, concluding that there were no genuine issues of material fact and Franklin Covey was entitled to judgment as a matter of

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[3](...continued)
flow of procedural and jurisdictional pleadings and amended pleadings on topics such as removal, personal jurisdiction, standing and venue. To assist the Court in following the procedural history of this case through several courts and numerous pleadings, Franklin Covey has attached as Exhibit 1 in the Addendum a chart chronicling this case's progression through the courts below.

law. (*Id.*). On July 27, 1998, based upon its ruling on Franklin Covey's Motion for Summary Judgment, the trial court entered a final Declaratory Judgment finding that Franklin Covey was a "person interested" under the Utah Declaratory Judgment Act and declaring that (1) the **Release** signed by Melvin barred any claim for commissions for sales prior to the date of Melvin's termination; and (2) the parties' express **Compensation Agreement** barred any *quantum meruit* claim by Melvin for post-termination commissions. (Declaratory Judgment Order, R. 410-12).

On September 11, 1998, **46 days** after the trial court's final Judgment, Melvin filed a Notice of Appeal. (First Notice of Appeal, R. 424). On December 9, 1998, the Supreme Court dismissed Melvin's appeal as untimely. (Supreme Court's Dec. 9, 1998 Order, R. 681). As a result of his untimely First Appeal of the Declaratory Judgment, **Melvin cannot obtain appellate review of the Declaratory Judgment or any prior orders of the trial court.**

After filing his untimely First Notice of Appeal, Melvin returned to the trial court. On October 8, 1998, Melvin filed the following five post-judgment motions with the trial court: (1) Motion for Extension of Time to File Appeal; (2) Motion to Stay; (3) Motion for Sanctions; (4) Motion for Relief From Judgment (Rule 60(b)(1)); and (5) Motion for Relief From Judgment (Rules 60(b)(2) and (3)). On November 10, 1998, Judge Young issued a Memorandum Decision denying all five of Melvin's post-judgment motions. (Memorandum Decision, R. 662-666). On December 8, 1998, Melvin filed the instant appeal which

challenges Judge Young's Memorandum Decision denying Melvin's Motion(s) for Relief From Judgment. (Melvin's Second Notice of Appeal, R. 667). On February 8, 1999, the Utah Supreme Court transferred this matter to the Utah Court of Appeals. (Supreme Court's Feb. 8, 1999 Order, R. 682).

C. Disposition of the Court Below

In its November 10, 1998 Memorandum Decision, the trial court denied all of Melvin's post-judgment motions. Melvin's two Motions for Relief From Judgment or Order under Rule 60(b)(1), (2) and (3) were denied because the court determined that Melvin failed to demonstrate the existence of mistake, newly discovered evidence or fraud that would warrant relief from judgment. (Memorandum Decision, R. 664). In this appeal, Melvin does not appeal the trial court's ruling on his post-judgment Motion for Extension of Time for Appeal, Motion for Sanctions, or Motion to Stay Enforcement of Judgment. **The only issue now on appeal is the trial court's November 10, 1998 Memorandum Decision denying Melvin's Motions for Relief From Judgment under Rule 60(b)(1), (2) and (3) of the Utah Rules of Civil Procedure.**

STATEMENT OF FACTS

Melvin was employed by Franklin Covey as an account executive from November 1, 1995 until September 12, 1997. (Memorandum in Support of Motion for Summary Judgment, R. 100). He was paid on a base salary plus commission basis until the spring of 1997. (*Id.* at R. 99). In April 1997, Franklin Covey informed Melvin that his employment

would be terminated as a result of inadequate sales. Melvin asked to keep his job and offered to work on a straight commission basis. (*Id.*). Franklin Covey and Melvin then executed the Compensation Agreement. (*Id.* at R. 100). The Compensation Agreement confirmed Franklin Covey's long-standing policy and practice providing that account executives, such as Melvin, were ineligible to receive commissions on seminars held or products sold **after** the account executive's termination. Specifically, Melvin and Franklin Covey's Compensation Agreement provided: "According to Franklin policy, commissions are paid **only for those services delivered while you are employed by Franklin.**" (Exhibit B to Memorandum in Support of Motion for Summary Judgment, R. 114) (emphasis added).

On September 12, 1997, Franklin Covey terminated Melvin's employment. (*Id.* at R. 101). Franklin Covey paid Melvin $2,029.57 for commissions for all sales of services and products that were delivered before Melvin's September 12, 1997 termination date. (Exhibit C to Franklin Covey's Memorandum in Support of Motion for Summary Judgement, R. 116). Melvin signed the **Release** acknowledging receipt of payment and releasing Franklin Covey "from all liability arising out of its failure to pay [Melvin] commissions for sales completed before [Melvin's] termination on September 12, 1997." (*Id.*)

A few months later, Melvin's attorney sent Franklin Covey a draft Complaint to be filed in the United States District Court for the District of Maryland and a demand for $600,000.00 on a theory of *quantum meruit* for sales or services which could conceivably be delivered **after** Melvin's termination. (Franklin Covey Complaint, R. 3, Exhibit B to

Franklin Covey's Complaint, R. 7-13). In spite of the fact that this demand violated the express terms of the Compensation Agreement, Melvin threatened to file the Complaint if Franklin Covey did not pay. (*Id.*; *see also* Exhibit B to Melvin's Memorandum in Support of Defendant's Motion to Dismiss, R. 78-79). Based on the parties' Compensation Agreement and the Release, Franklin Covey filed a declaratory judgment action in the Third Judicial District Court for Salt Lake County. In its declaratory judgment action, Franklin Covey requested a declaration that it had "no obligation to pay Melvin compensation or commissions for potential future sales or for seminars scheduled or products sold subsequent to the effective date of Melvin's termination" as well as a declaration that the Release barred Melvin's claims regarding any "other claims related to payment of compensation or commissions for services performed by Melvin during his employment with Franklin Covey." (Franklin Covey's Complaint, R. 5).

Approximately three weeks after Franklin Covey filed its declaratory judgment action, Melvin filed a complaint in the United States District Court for the District of Maryland ("Maryland Complaint") almost identical to the draft complaint previously sent to Franklin Covey. (Exhibit A to Memorandum in Support of Motion for Summary Judgment, R. 106). Melvin's Maryland Complaint demanded payment on the basis of *quantum meruit* for sales and services delivered **after** Melvin's termination and commission for any **potential future** sales to any **potential future** customers with whom Melvin alleged he had any contact. (*Id.* at R. 12). **The trial court subsequently concluded that Melvin's undisputed Release**

barred any claims for commissions prior to Melvin's termination and that the express terms of Melvin's undisputed Compensation Agreement barred his *quantum meruit* claim for post-termination commissions. Accordingly, the trial court granted Franklin Covey's Motion for Summary Judgment. The trial court also denied Melvin's Motions to Dismiss for lack of personal jurisdiction. (Judge Young's Order, R. 393-94).

SUMMARY OF ARGUMENT

Melvin's First Notice of Appeal has already been dismissed as untimely. The current appeal embraces only the trial court's November 10, 1998 Memorandum Decision denying Melvin's Rule 60(b) motions. Yet, Melvin's Brief nonchalantly and incorrectly assumes entitlement to full merit review of the trial court's rulings below and endeavors to confuse the issues presented and applicable standards of review. The only decision on appeal is the trial court's Memorandum Decision denying Melvin's Rule 60(b) motions. This Court reviews a trial court's ruling on a 60(b) motion for **abuse of discretion**. As demonstrated in this brief, the trial court did not abuse its discretion in denying Melvin's Motions for Relief from Judgment under Rule 60(b)(1) (mistake), (2) (new evidence) and (3) (fraud).

Melvin asserted in his Rule 60(b)(1) motion, and now on appeal, that the trial court made five "mistakes" that justified relief from the court's prior rulings. The first mistake, according to Melvin, is that Franklin Covey Client Sales, Inc. was not his employer and,

therefore, had no standing to bring its declaratory judgment action against him.[4] The trial court did not abuse its discretion in denying this aspect of Melvin's Motion for Relief From Judgment for several reasons. First, it was undisputed that there was only one employment relationship and the terms of that relationship were unequivocally established by the undisputed Compensation Agreement. Second, Melvin's actual employer was Franklin Covey Client Sales, Inc. and this fact was repeatedly established by reference to Melvin's IRS form W-2 for tax year 1997, which Melvin admitted receiving. Third, even if Franklin Covey Client Sales, Inc. had not been Melvin's actual employer, Rule 17 of the Utah Rules of Civil Procedure specifically provides that a party in whose name a contract has been made for the benefit of another may sue in that person's name without joining the party for whose benefit the action is brought. Thus, even if Franklin Covey Co. had been Melvin's actual employer, Franklin Covey Client Sales, Inc. would still be permitted to sue in its own name without joining Franklin Covey Co. Fourth, to the extent necessary (if at all) Franklin Covey Client Sales, Inc. received a precautionary assignment from Franklin Covey Co. of "any rights which may be necessary to entitle Plaintiff to prosecute this action as the real party-in-interest." Finally, Franklin Covey Co. consented to be bound by the judgment entered in this

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[4]Melvin confuses the issue of whether Franklin Covey Client Sales, Inc. had standing to assert its declaratory judgment action as an issue of subject matter jurisdiction. Despite his incorrect nomenclature, the issue is one of standing, not subject matter jurisdiction, which the trial court clearly had in this case.

action to the same extent as Franklin Covey Client Sales, Inc. (plaintiff below) thereby assuring Melvin of a full recovery from **both** entities of any commissions owed to him.

The second "mistake," according to Melvin, is that the facts in the summary judgment record do not support the trial court's Declaratory Judgment. However, Franklin Covey presented undisputed material facts demonstrating that the **Compensation Agreement** expressly precluded commissions for sales and services **after** Melvin's termination. Additionally, pursuant to the **Release**, it was undisputed that Melvin had been paid all commissions for services and products delivered as of the date of termination. These two undisputed facts completely disposed of the narrow legal question presented. Accordingly, the trial court determined, as a matter of law, that there were no genuine issues of material fact and the express agreements precluded Melvin from receiving past and potential future commissions. This determination fully supported the trial court's Declaratory Judgment.

The third "mistake," according to Melvin, is that the trial court abused its discretion when it allegedly extended its order to cover Maryland law even though Maryland law had not been briefed. Melvin profoundly misunderstands the trial court's ruling. The trial court did not extend its order to cover Maryland law. The trial court merely determined that both Utah and Maryland law were identical regarding the issue of *quantum meruit* and, therefore, it did not need to conduct a conflicts of laws analysis in making its determination.

The fourth "mistake," according to Melvin, is that the trial court abused its discretion in ruling on Franklin Covey's Motion for Summary Judgement without affording Melvin an

opportunity to conduct discovery. In the instant case, two material facts were undisputed. The **Release** provided that Melvin was not entitled to compensation prior to his termination and the **Compensation Agreement** provided that Melvin was not entitled to compensation after his termination. No additional discovery could change these undisputed facts which exclusively control disposition of this case. Moreover, Melvin failed to demonstrate that any additional discovery was material and of a substantial nature.

The fifth "mistake," according to Melvin, is that the trial court "mechanically adopted" the findings of fact and conclusions of law presented by counsel for Franklin Covey. This argument completely misapprehends the summary judgment procedure. In the context of Rule 56, the court does not make findings of fact and conclusions of law. Rather, the court determines whether a party is entitled to judgment as a matter of law based upon facts as to which there is no genuine dispute. Moreover, Melvin has waived this issue by failing to raise it below--a failure to which he admits in his brief. Therefore, this issue has not been preserved for appeal.

In addition to his allegations of mistake, Melvin asserted in his Rule 60(b)(2) motion that allegedly "new evidence" justified setting aside the trial court's prior Order. The alleged "new evidence" is Franklin Covey Co.'s Answer to a Complaint filed against it by a former employee in California. In its Answer to the California Complaint, Franklin Covey Co. asserted that Franklin Covey Client Sales, Inc. was the plaintiff's true employer. This

position is identical to that asserted in this case and perfectly consistent with the trial court's earlier rulings and provided no basis for the trial court to set aside its earlier rulings.

In his Rule 60(b)(3) motion, Melvin argued that the existence of fraud justified setting aside the trial court's prior orders. Melvin's fraud claim is grounded on the mistaken belief that Franklin Covey Co.'s counsel lacked authority to submit the Consent to be Bound on behalf of Franklin Covey Co. Because Melvin professed confusion as to whether he was employed by Franklin Covey Client Sales, Inc. or Franklin Covey Co., Franklin Covey Co. filed a pleading advising the Court that any rights necessary to perfect Franklin Covey Client Sales, Inc.'s standing had been assigned and that Franklin Covey Co. agreed to be bound by any judgment, thus assuring Melvin of entitlement to recover from **both** entities. Melvin claims this pleading was fraudulent because he disbelieves that this law firm actually represents Franklin Covey Co. This position is absurd. Melvin is well aware that this law firm represents both Franklin Covey Co. and Franklin Covey Client Sales, Inc. In fact, he is also aware that this law firm entered an appearance on behalf of **both** entities when he sued both entities in Maryland federal court. His fraud argument is completely disingenuous and does not entitle him to relief from the trial court's prior rulings.

Finally, the trial court also determined correctly that it had specific personal jurisdiction over Melvin. It was undisputed that Melvin admitted significant contacts and **ten** trips to Utah directly related to his employment. Moreover, Melvin's Maryland Complaint demanded payment from Franklin Covey for work he specifically asserted he performed in

Utah. (Exhibit B to Franklin Covey's Complaint, R. 11). **Melvin came to Utah to conduct business, he conducted business, and demanded payment for what he did here. That is "purposeful availment."** Accordingly, the trial court concluded correctly that it could exercise specific personal jurisdiction over Melvin.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MELVIN'S RULE 60(b) MOTIONS.

The only decision on appeal is Judge Young's November 10, 1998 Memorandum Decision denying Melvin's Motions for Relief From Judgment or Order under Rule 60(b)(1) (mistake), (2) (newly discovered evidence) and (3) (fraud).[5] The standard of review applicable to the trial court's post-judgment rulings is **abuse of discretion.** *See, e.g., Ostler v. Buhler,* 957 P.2d 205, 206 (Utah 1998) ("A trial court has discretion in determining whether a movant has shown 'mistake, inadvertence, surprise, or excusable neglect,' and this Court will reverse the trial court's ruling only when there has been an abuse of discretion."); *Larsen v. Collina,* 684 P.2d 52, 58 (Utah 1984) (abuse of discretion review for trial court's

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[5]Rule 60(b) provides in pertinent part:

> [T]he court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party. . . .

UTAH R. CIV. P. 60(b).

Rule 60(b) determinations); *Birch v. Birch,* 771 P.2d 1114, 1117 (Utah Ct. App. 1989) (same). Under this standard, the Court "will not reverse unless the decision **exceeds the limits of reasonability**." *State v. Larsen,* 865 P.2d 1355, 1361 (Utah 1993); *Crookston v. Fire Ins. Exch.,* 860 P.2d 937, 938 (Utah 1993). As demonstrated below, the trial court acted appropriately when it sustained its prior orders and rejected Melvin's Rule 60(b) arguments.

A. The Trial Court Did Not Abuse its Discretion in Determining That it Made No Mistake Justifying Relief From Judgment Under Rule 60(b)(1).

1. The Trial Court Made No Mistake and Did Not Abuse its Discretion in Determining That Franklin Covey Co. Had Standing.

Melvin was employed by Franklin Covey Client Sales, Inc.[6] However, in his pleadings below, and now on appeal, Melvin professes confusion as to whether Franklin Covey Client Sales, Inc. or Franklin Covey was his employer. Melvin asserts that Franklin Covey Co. was his employer and, therefore, it was "inappropriate for [Franklin Covey Client Sales, Inc.] to attempt to obtain judgment against [Melvin] on behalf of Franklin Covey Co. without joining Franklin Covey Co." (Appellant's Brief at 36). As demonstrated below,

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[6]This fact was repeatedly established by reference to Melvin's IRS form W-2 for tax year 1997. Moreover, Melvin admits that he received his W-2 from Franklin Covey Client Sales, Inc. (Appellant's Brief at 35). Despite receiving his W-2 form from Franklin Covey Client Sales, Inc., Melvin asserts that Franklin Covey Client Sales, Inc. was a "mystery" to him when this case was initiated by it. (*Id.* at 36). It is exactly because of this professed confusion and gamesmanship that Franklin Covey Co. decided to moot the issue by executing the assignment and Consent to be Bound.

however, Melvin's argument regarding the identity of his employer is frivolous and the trial court did not abuse its discretion when it denied this aspect of Melvin's Rule 60(b)(1) motion.

a. Melvin's alleged confusion about the identity of his employer is irrelevant because there is only one employment relationship.

In his demand letter to Franklin Covey and in his Maryland Complaint, Melvin sought to recover commissions for sales of products and services which occurred **after** his termination on the basis of *quantum meruit.* (Exhibit B to Franklin Covey's Complaint, R. 12). In Franklin Covey's declaratory judgment action and Motion for Summary Judgment, Franklin Covey presented the trial court with an express Compensation Agreement between the parties that provided that Melvin was not entitled to commissions for sales and services delivered **after** his employment ended. (Exhibit B to Franklin Covey's Memorandum in Support of Motion for Summary Judgment, R. 114-15). Thus, the trial court was presented with a straightforward legal question: Can Melvin assert a claim under *quantum meruit* for post termination commissions when his express Compensation Agreement prohibited it?

The answer to this question is the same whether Melvin was employed by Franklin Covey Client Sales, Inc. or Franklin Covey Co. Either way, there was only **one employment relationship**. The terms of that relationship were established by the undisputed Compensation Agreement. The rights of Franklin Covey (whether Franklin Covey Co. or Franklin Covey Client Sales, Inc.) and Melvin are established by that Agreement, and Melvin's attempt to obtain quasi-contract recovery on a claim is precluded by that

Agreement. Melvin could not avoid the judicial determination required by the undisputed facts by professing confusion as to whether he was employed by the parent or the subsidiary. Accordingly, whether Franklin Covey Co. or Franklin Covey Client Sales, Inc. was his employer was and is irrelevant to the narrow legal issue presented by this case.

b. Melvin's alleged confusion about the identity of his employer is irrelevant because the action was binding against both Franklin Covey Client Sales, Inc. and Franklin Covey Co.

Melvin's complains he was disadvantaged because the declaratory judgment action was brought by Franklin Covey Client Sales, Inc. and not Franklin Covey Co. This complaint is senseless because the declaratory judgment action was binding against **both** Franklin Covey Co. and Franklin Covey Client Sales, Inc., a wholly-owned subsidiary of Franklin Covey Co. Melvin's attempt to evade the substance of this action by professing confusion about which entity was his employer is useless for at least two reasons.

First, Rule 17 of the Utah Rules of Civil Procedure expressly provides: "[A] party with whom or in whose name a contract has been made for the benefit of another . . . may sue in that person's name **without joining the party for whose benefit the action is brought.**" U.R.C.P. 17(a) (emphasis added). Thus, even if this action redounded to the benefit of Franklin Covey Co., Franklin Covey Client Sales, Inc. was permitted to sue in its own name without joining Franklin Covey Co.

Second, to the extent necessary (if at all) Franklin Covey Client Sales, Inc. received a precautionary assignment from Franklin Covey Co. of "any rights which may be necessary

to entitle Plaintiff to prosecute this action as the real party-in-interest." (Exhibit B to Franklin Covey's Reply Memorandum in Support of Motion for Summary Judgment, R. 303). Further, Franklin Covey Co. consented to be bound by the judgment entered in this action to the same extent as Plaintiff ("Consent to be Bound"). (*Id.*). Thus, Rule 17's purpose of ensuring that the "defendant will be permitted to assert all defenses or counterclaims available against the real owner of the cause" was clearly satisfied. *Shaw v. Jeppson,* 239 P.2d 745, 748 (Utah 1952).

Melvin complains in his brief that Franklin Covey Co. is attempting to evade its obligations. However, Franklin Covey Co.'s actions are decidedly opposite from an attempt to evade obligations. Franklin Covey's consent to be bound operates to **accept**, not evade, liability. Melvin is helped by the assignment between Franklin Covey Co. and Franklin Covey Client Sales, Inc. in at least two ways. First, it assures him of the opportunity to raise all available defenses to the declaratory judgment action. Second, it assures Melvin of the ability to recover on commissions to which he can establish entitlement from **both** entities. Every concern of which Melvin complains is positively satisfied by Franklin Covey Co.'s Consent to be Bound. Quite simply, Franklin Covey Co.'s filing of its Consent to be Bound makes Melvin's argument **moot** by giving him additional security and ensuring that plaintiff Franklin Covey Client sales, Inc. was the real party in interest. *See Lynch v. MacDonald,* 367 P.2d 464, 468 (Utah 1962) ("The general rule is that an assignee is the real party in interest.").

Melvin's effort to contest the validity of the precautionary assignment is pointless. There is absolutely no dispute between the parties to the assignment as to its validity. Franklin Covey Co. unequivocally assigned to Franklin Covey Client Sales, Inc. "any and all rights and obligations relating to or arising out of David Melvin's employment with Franklin Covey Co." Franklin Covey Co. also assigned "any and all rights that may be necessary, if any, to entitle Assignee to prosecute, as the real party in interest, any legal proceedings concerning David Melvin." (Exhibit F to Franklin Covey's Memorandum in Opposition to Melvin's Motions for Relief From Judgment or Order, R. 617). A copy of the actual assignment was provided to Melvin and the trial court and neither Franklin Covey Co. (the assignor) nor Franklin Covey Client Sales, Inc. (the assignee) disputes the existence and validity of the assignment. Melvin was not a party to the assignment and has no basis nor standing upon which to dispute its validity. Indeed, it is perplexing that Melvin would even dispute the assignment given that the assignment positively enures to his benefit.

2. The Trial Court Made No Mistake and Did Not Abuse its Discretion in Finding That the Facts in the Record Support its Summary Judgment Order.

Franklin Covey presented the trial court with two unambiguous and undisputed agreements which supported the trial court's summary judgment Order and Declaratory Judgment. The undisputed **Release** conclusively established that Melvin had been paid all commissions for services and products delivered as of the date of his termination. (Franklin Covey's Memorandum in Support of Motion for Summary Judgment, R. 101, Exhibit C of

Memorandum in Support of Motion for Summary Judgment, R. 116). The undisputed **Compensation Agreement** provided in express terms that Melvin was to be paid commissions "only for those products and services delivered while [he was] employed by Franklin." (*Id.* at R. 100, Exhibit B of Memorandum in Support of Motion for Summary Judgment, R. 114). The **Release** absolutely foreclosed any claim for commissions prior to his termination date and the **Compensation Agreement** absolutely foreclosed any claims for commissions after his termination date. Moreover, case law authority in Maryland and Utah provide unequivocally that *quantum meruit* recovery is not available where there is an express agreement between the parties. Therefore, Melvin's claim in *quantum meruit* was instantly and totally decimated by the existence of these two express agreements.

Because these two agreements foreclosed any genuine issue of material fact, the trial court correctly determined that Franklin Covey was entitled to judgment as a matter of law. (Judge Young's Order, R. 393-94). The trial court's Declaratory Judgment was based upon and supported by the outcome of its summary judgment Order. Therefore, the trial court did not abuse its discretion in denying Melvin's Motion for Relief From Judgment under Rule 60(b)(1) when it refused to set aside its earlier Order granting Franklin Covey's Motion for Summary Judgment and its Declaratory Judgment.

3. The Trial Court Made No Mistake and Did Not Abuse its Discretion in Finding That No Conflicts of Laws Analysis Was Needed Where the Result Would be the Same in Both Utah and Maryland.

Melvin profoundly misunderstands the trial court's ruling regarding Maryland law. In its Motion for Summary Judgment, Franklin Covey argued that Melvin's claim for *quantum meruit* was unmeritorious because such a claim can exist only where there is no express agreement. (Franklin Covey's Memorandum in Support of Motion for Summary Judgment, R. 101-103). In making its argument below, Franklin Covey cited several Utah cases holding that *quantum meruit* did not apply where an express agreement existed. (*Id.* at R. 102-103). Franklin Covey pointed out that Maryland law was identical on this point. (*Id.* at R. 103). *See, e.g., Mass Transit Admin v. Granite Constr. Co.,* 471 A.2d 1121, 1126 (Md. Ct. App. 1984) ("When there is an express contract dealing specifically with the services rendered, *quantum meruit* is unavailable."). Thus, the trial court did not need to engage in a conflicts of laws analysis to determine which state's law (Utah or Maryland) would apply because the **result would be the same under either**. When Melvin raised this issue in his Rule 60(b)(1) Motion for Relief of Judgment, the trial court made no mistake in refusing to set aside the Declaratory Judgment.

4. The Trial Court Made No Mistake and Did Not Abuse its Discretion by Ruling on Franklin Covey's Motion for Summary Judgment Without a Continuance.

Melvin also incorrectly asserts that whenever a motion for continuance is made because discovery is not yet completed the court should automatically grant that motion.

(Appellant's Brief at 46-47). Accordingly, Melvin argues that the trial court should not have ruled on Franklin Covey's Motion for Summary Judgment without affording Melvin an opportunity to conduct discovery. Again, Melvin makes no allegation that the trial court made any mistake and abused its discretion; he simply disagrees with the court's ruling. The trial court did not abuse its discretion on ruling on Franklin Covey's Motion for Summary Judgment when it did. Rule 56(f) of the Utah Rules of Civil Procedure provides in pertinent part:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

UTAH R. CIV. P. 56(f). Trial courts may properly deny such motions "where they are found to be 'lacking in merit.'" *American Towers Owners Assoc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1195 (Utah 1996) (quoting *Crossland Sav. v. Hatch,* 877 P.2d 1241, 1243 (Utah 1994)). The trial court may also deny such motion where it is found to be dilatory. *Crossland Sav., v. Hatch,* 877 P.2d 1241, 1243-44 (Utah 1994).

Moreover, a Rule 56(f) movant must explain how the continuance will aid his opposition to summary judgment and the additional discovery requested by the movant must be material and of a substantial nature. *American Towers,* 930 P.2d at 1195. In *American Towers,* the Utah Supreme Court held that the trial court did not abuse its discretion in

denying a Rule 56(f) motion to continue discovery where the plaintiff's **claims failed as a matter of law and where the facts the plaintiff sought to discover were irrelevant to those issues.** *Id.*; *see also Jones v. Bountiful City Corp.,* 834 P.2d 556, 561 (Utah Ct. App. 1992) (trial court should not grant Rule 56(f) motion to protect party from merits of motion for summary judgment).

In this case, two material facts were undisputed: the **Release** provided that Melvin was not entitled to compensation prior to his termination and the **Compensation Agreement** provided that Melvin was not entitled to compensation after his termination. No additional discovery could change these undisputed facts to which Melvin had already admitted. Based upon the two undisputed facts, the trial court could determine as a matter of law that Melvin was not entitled to compensation for sales delivered either prior to or after his termination. Thus, as in *American Towers,* the trial court found that Melvin's claims were lacking in merit and Franklin Covey was entitled to judgment. There were no additional facts necessary to this determination.[7]

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[7]Melvin argues that he asserted in his response to Franklin Covey's Motion for Summary Judgment that the agreements were ambiguous and there had been no meeting of the minds. There is no discovery that would have assisted the trial court with regard to these defenses because **whether a contract is ambiguous is strictly a question of law** as is the interpretation of that contract. *Frontier Foundations, Inc. v. Layton Constr. Co.,* 818 P.2d 1040, 1041 (Utah Ct. App. 1991). Moreover, the trial court was not required to inquire into the potentially divergent understandings of the parties to determine the meaning of the Compensation Agreement because parol evidence could not have been considered unless the Agreement was ambiguous. *Utah Valley* B*ank v. Tanner,* 636 P.2d 1060, 1062 (Utah 1981) ("[I]t is only when an ambiguity exists which cannot be reconciled by an objective and reasonable interpretation of the contract as a whole that resort may be had to the use of extrinsic evidence."). The trial court (continued...)

In addition, Melvin failed to articulate the additional discovery he would conduct if the continuance were granted. He also failed to demonstrate that the additional discovery he requested was material and of a substantial nature. **Melvin also failed to submit an affidavit in support of a continuance as specifically required by Rule 56(f)**. Thus, the trial court did not abuse its discretion in denying Melvin's Motion for Relief From Judgment under Rule 60(b)(1) when it affirmed its earlier decision to rule on Franklin Covey's Motion for Summary Judgment.

5. The Trial Court Did Not Mechanically Adopt Any Findings of Fact or Conclusions of Law.

a. Melvin did not preserve the issue of "Mechanical Adoption."

Melvin argues on appeal that the trial court "mechanically adopted the findings of fact and conclusions of law" presented by counsel for Franklin Covey. (Appellant's Brief at 42). As Melvin correctly recognizes in his principal brief, **this issue was not raised with the trial court in Melvin's Rule 60(b) motions**. In his brief, Melvin states, "[t]his issue was not raised with the trial court because it did not become relevant until after the trial court made its rulings." (Appellant's Brief at 4). However, Melvin failed to raise this issue in his Rule 60(b) motions, which he made **after** the trial court had entered its final Declaratory Judgment. Melvin clearly had an opportunity to raise this argument in his Rule 60(b)

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[7](...continued)
correctly determined that the Compensation Agreement was not ambiguous and did not abuse its discretion in interpreting it as a matter of law.

motions, but failed to do so. This issue has not been preserved for appeal. *See Hart v. Salt Lake County Comm'n,* 945 P.2d 125, 129-30 (Utah Ct. App. 1997) (to preserve issue for appeal, party must first raise issue before trial court); *West One Bank, Utah v. Life Ins. Co.,* 887 P.2d 880, 882 n.1 (Utah Ct. App. 1994) (issue must be submitted to trial court for ruling to preserve an issue for appeal).

b. *The trial court did not make a mistake by applying the summary judgment standard rather than making findings of fact and conclusions of law.*

Even if this issue were properly before this Court, Melvin's argument is without merit for two reasons. First, in ruling on Franklin Covey's Motion for Summary Judgment, the trial court was required to apply the summary judgment standard and was not required to make findings of fact and conclusions of law. Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment will be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." UTAH R. CIV. P. 56(c).

Second, the trial court did not "mechanically adopt the findings of fact and conclusions of law" presented by counsel for Franklin Covey. Rather, the trial court ruled on Franklin Covey's Motion for Summary Judgment, finding there were "**no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.**" (Judge Young's Order, R. 393-94). The trial court made this ruling after "having read briefs and memoranda submitted by the parties and the accompanying attachments and having considered the

relevant authorities." (*Id.* at R. 394). Accordingly, the trial court did not make any mistake or abuse its discretion and its decision should be affirmed.

B. The Trial Court Did Not Abuse its Discretion in Determining That Melvin's "New Evidence" Did Not Justify Relief From Judgment Under Rule 60(b)(2).

Melvin also attempts to make a "smoking gun" out of "new evidence."[8] Melvin's supposed "new evidence" is that Franklin Covey Co., in an unrelated case, admitted it is a separate company from Franklin Covey Client Sales, Inc. (Appellant's Brief at 37). The supposed "new evidence" is Franklin Covey Co.'s Answer to a Complaint filed against it by a former employee in California. In its Answer to the California Complaint, Franklin Covey Co. asserted that Franklin Covey Client Sales, Inc. was that plaintiff's true employer--**a position identical with that asserted in this case and perfectly consistent with the trial court's prior rulings**. (Franklin Covey Co.'s California Answer, R. 535 at ¶ 29). The trial court did not abuse its discretion in denying Melvin's Rule 60(b)(2) motion based on this "new evidence."

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[8]This allegedly "new evidence" does not qualify as new evidence under Rule 60(b)(2). Rule 60(b)(2) requires that the newly discovered evidence must have been evidence that could not have been discovered by due diligence in time to move for a new trial under Rule 59(b). In this instance, the "new evidence" is Franklin Covey Co.'s Answer to a California Complaint. The Answer was filed on June 25, 1998, which was prior to the trial court's ruling on Franklin Covey's Motion for Summary Judgment and Melvin's Motions to Dismiss. Accordingly, this evidence could have been discovered through due diligence in time for Melvin to assert it in a Rule 59(b) motion. Therefore, this allegedly "new evidence" does not fall within Rule 60(b)(2) and was not a basis for relief from judgment.

C. The Trial Court Did Not Abuse its Discretion in Determining That the Consent to be Bound Was Proper and Thus Refusing to Relieve Melvin From the Declaratory Judgment Based on Fraud Under Rule 60(b)(3).

In his Rule 60(b)(3) motion, Melvin argued that the alleged existence of fraud justified setting aside the trial court's prior orders. His fraud claim is loosely based on the disingenuous belief that Franklin Covey Co.'s counsel lacked authority to submit the Consent to be Bound because counsel for Franklin Covey Client Sales, Inc. did not also represent Franklin Covey Co. Of course, Melvin had absolutely no basis for this unsubstantiated allegation. More seriously, however, Melvin had **actual knowledge** that this firm represents Franklin Covey Co. Melvin sued both Franklin Covey Co. and Franklin Covey Client Sales, Inc. in Maryland federal court. This firm entered an appearance on behalf of **both** entities. (Franklin Covey's Memorandum in Opposition to Melvin's Motion for Sanctions, R. 592). Therefore, he has no basis to claim that this firm does not represent both entities.

Melvin contests the validity of the Consent to Be Bound because he confuses it with the actual assignment, rather than notice of the assignment. This confusion is inexplicable. It was obvious that the Consent to be Bound was a pleading, not the actual assignment. The Consent to be Bound explained that Franklin Covey Co. "hereby acknowledges an assignment to it of any rights which may be necessary (if any) to entitle [Franklin Covey Client Sales, Inc.] to prosecute this action as the real-party-in-interest." (Exhibit B to Franklin Covey's Reply Memorandum in Support of Motion for Summary Judgment, R. 303). **The actual assignment was executed by Franklin Covey Co.'s President and**

Franklin Covey Client Sales, Inc.'s Vice President, a copy of which was previously provided to Melvin and filed with the trial court. (R. 617). Melvin has no basis for his fraud claim and, therefore, the trial court did not abuse its discretion in refusing to set aside its earlier Order on the basis of fraud.

II. MELVIN IS SUBJECT TO PERSONAL JURISDICTION BECAUSE HE SEEKS COMPENSATION "ARISING OUT OF" HIS CONTACTS WITH UTAH.

The trial court correctly determined that it had specific personal jurisdiction over Melvin. In his Declaration, which Melvin attached to his Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Change Venue, Melvin admitted significant contacts and **ten** trips to Utah directly related to his employment. (Declaration attached to Melvin's Memorandum in Support of Motion to Dismiss, R. 71-74). In his Maryland Complaint, Melvin also alleged that he procured a "major new customer" for Franklin Covey while in Utah and demanded compensation for his work in Utah. (Exhibit B to Franklin Covey's Complaint, R. 11 at ¶ 15). As a result, the trial court properly exercised specific personal jurisdiction over Melvin.

Under Utah law, a three-part inquiry is used to determine whether specific jurisdiction exists: "(1) the defendant's acts or contacts must satisfy the Utah long-arm statute; (2) a

'nexus' must exist between the plaintiff's claims and the defendant's acts or contacts; and (3) application of the Utah long-arm statute must satisfy the requirements of federal due process." *SII Megadiamond, Inc. v. American Superabrasives Corp.*, 969 P.2d 430, 433-35 (Utah 1998).[9]

A. Melvin Has "Transacted Business" Under the Utah Long-Arm Statute.

The Utah long-arm statute is satisfied if Melvin has "transact[ed] **any** business within the state." UTAH CODE ANN. § 78-27-24(a) (1996) (emphasis added). A person transacts business when he engages in any activity which "affect persons or businesses within the state of Utah." *Id.* at § 78-27-23. The Utah Supreme Court has given liberal construction to the Utah long-arm statute in general. *See Synergestics v. Marathon Ranching Co.*, 701 P.2d 1106, 1110 (Utah 1985) (Utah long-arm statute is broad and invites liberal application). In fact, a defendant need not be present in the state in order to transact business in Utah. *SII Megadiamond,* 969 P.2d at 433-34 (actual physical presence in forum not required); *see also Brown v. Washoe Housing Auth.*, 625 F. Supp. 595, 599 (D. Utah 1985), *rev'd on other grounds,* 835 F.2d 1327 (10th Cir. 1988) (actual presence in state not required to transact business in state). **Even a single phone call to a Utah resident is sufficient to satisfy the "transacting business" threshold because such a call "affects persons and businesses**

[9]In his brief, Melvin argues at length that he is not subject to general jurisdiction. This is not disputed. Melvin does not have such "continuous and systematic contacts" with the forum such that he could be haled into a Utah court on matters unrelated to his dealings with Franklin Covey. *See Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 415 (1984).

within the State of Utah." *Nova Mud Corp. v. Fletcher,* 648 F. Supp. 1123, 1126 (D. Utah 1986);*see also Neways, Inc. v. McCausland,* 950 P.2d 420, 423 (Utah 1993) (telephone contact with agents in Utah to solicit orders and acceptance of payments originating in Utah constitute "transaction of any business"); *G.M. Diesel, Inc. v. Piper Aircraft Corp.,* 578 P.2d 850, 853 (Utah 1978) (under the long-arm or "transaction of business concept," personal jurisdiction may be asserted with only minimum contacts if the claims arise out of activity within the forum-state); *Kamdar & Co. v. Laray Co., Inc.,* 815 P.2d 245, 248 (Utah Ct. App. 1991) (sending financial records to Utah for preparation of financial statements and tax returns constitute a "business transaction").

Melvin "transacted business" in Utah under the long-arm statute. He made **ten** trips to Utah to conduct business here; he was an employee of a Utah resident; his direct supervisor was in Utah during the first year of his employment; and he acknowledged having regularly spoken with other Franklin Covey employees in Utah. (Franklin Covey's Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, R. 122). Melvin's conduct clearly falls within the broad parameters of the Utah long-arm statute.

B. There is a "Nexus" Between Melvin's Contacts With Utah and the Claims Raised in the Declaratory Judgment Action.

The "nexus" requirement is satisfied when a non-resident engages in conduct within the state and the plaintiff's claims against the defendant "arise from" that conduct. *SII*

Megadiamond, 969 P.2d at 435; *Neways, Inc.,* 950 P.2d at 423. Melvin's own pleadings conclusively establish that this prong is satisfied.

Melvin's Maryland Complaint and Melvin's Declaration acknowledge that he traveled to Utah on at least **ten** separate occasions and that he transacted business with Franklin Covey while in Utah. (*Id.* at R. 122). Melvin further acknowledged that he corresponded with co-workers in Utah in order to make sales in his assigned territory (*Id.* at R. 122-23). Most significantly, Melvin plead in his own Maryland Complaint that:

> On one or more occasions, Melvin traveled to Utah to meet with potential customers of Franklin Covey to help develop a relationship. In particular, Melvin met with representatives of GEC-Marconi Hazeltine in Salt Lake City in May 1997. **Melvin's efforts resulted in the development of a major new customer for Franklin. Franklin has not compensated Melvin for his efforts with GEC-Marconi Hazeltine.**

(*Id.* at R. 123). Melvin's claim against Franklin Covey seeks compensation for work he admits performing in Utah. Melvin has affirmatively pled that he came here to conduct business, that he conducted business here, and now he demands payment for the work he alleges he performed here. His conduct, his contact with the forum and the claim he asserts are inextricably and directly linked. Melvin's claim has a direct, immediate, and inescapable nexus to his contacts with Utah.

C. The Court's Exercise of Jurisdiction Comported With the Requirements of Due Process.

Due process is satisfied when an individual has "fair warning that a particular activity may subject him to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner,* 433 U.S. 186, 218 (1977). This requirement is satisfied when, as here, "the defendant has purposefully directed his activities at residents of the forum and litigation results form alleged injuries that 'arise out of or relate to' these activities." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985). Due process mandates consideration of "(1) whether the cause of action arises out of or has a substantial connection with the activity; (2) the balance of the convenience of the parties and the interest of the state in assuming jurisdiction; and (3) the character of the defendant's activities within the State." *Ted R. Brown & Assoc. v. Carnes Corp.,* 611 P.2d 378, 380 (Utah 1980).

Melvin cannot have it both ways. He alleged in his Maryland Complaint that he came to Utah "on one or more occasions" to help develop a relationship with existing or potential clients and alleges that his "efforts resulted in development of a major new account for Franklin." (Franklin Covey's Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, R. 123). He now asks the Court to take seriously his argument that he "never knowingly, intentionally or unintentionally, subjected himself to the jurisdiction of the Utah courts." (Appellant's Brief at 33). Melvin asserted a claim against

Franklin Covey that derived **directly from** his contacts with this forum. Melvin simply cannot say that he has not had "fair warning" that he would be haled before a Utah court for matters related to work he alleged he performed here.

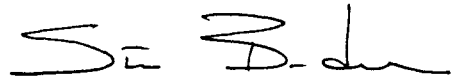
Moreover, the trial court's determination that Melvin is subject to personal jurisdiction is hardly "tortured" as Melvin asserts in his principal brief. (*Id.* at 41). Melvin warns this cases pushes the limits of personal jurisdiction because a gigantic multi-national corporation could sue its employees in any forum "although the employee's only contact may have been to drive through the state once or twice on his way to some other destination." (*Id.* at 42). Melvin's apocalyptic vision bears no resemblance to this case. The trial court found correctly that Melvin is subject to personal jurisdiction based upon: (1) Melvin's admission of at least ten trips to Utah related to his employment; and (2) Melvin's allegation that Franklin Covey owed him commissions specifically arising out of his efforts in Utah to solicit a major new customer. Under well-defined Utah law, Melvin transacted business in Utah subjecting him to personal jurisdiction by the courts of this state. *See, e.g., Radcliffe v. Akhaven,* 875 P.2d 608 (Utah Ct. App. 1994); *Kamdar & Co. v. Laray Co.,* 815 P.2d 245 (Utah Ct. App. 1991); *Harnischfeger Eng'rs, Inc. v. Uniflo Conveyor, Inc.,* 883 F. Supp. 608 (D. Utah 1995). As a result, the trial court correctly determined it could exercise specific personal jurisdiction over Melvin and the trial court's decision should be affirmed.

CONCLUSION

Based upon the foregoing, the trial court did not abuse its discretion in denying Melvin's Motions for Relief of Judgment under Rule 60(b)(1), (2) and (3) and the trial court correctly determined that it had specific personal jurisdiction over Melvin. Therefore, the trial court's November 10, 1998 Memorandum Decision should be affirmed.

DATED this 18th day of August, 1999.

MANNING CURTIS BRADSHAW & BEDNAR LLC



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellee Franklin Covey Client Sales, Inc. and Addendum to Brief of Appellee Franklin Covey Client Sales, Inc. to be served via U.S. Mail, postage prepaid thereon, this 18th day of August, 1999, to the following:

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